

BRIAN A. PAINO (CA SBN 251243)  
JOSEPH C. DELMOTTE (CA SBN 259460)  
PITE DUNCAN, LLP  
4375 Jutland Drive, Suite 200  
P.O. Box 17933  
San Diego, CA 92177-0933  
Telephone: (858) 750-7600  
Facsimile: (619) 590-1385

Attorneys for AURORA LOAN SERVICES, LLC

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA - FRESNO DIVISION

In re

ANDREW LUCAS AND DEANN LUCAS,  
Debtor(s).

Case No. 09-62179-A

Chapter 7

D.C. No. PD-1

MOTION FOR RELIEF FROM  
AUTOMATIC STAY AND  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT THEREOF  
(11 U.S.C. § 362 and Bankruptcy Rule 4001)

AURORA LOAN SERVICES, LLC,

Movant,

vs.

ANDREW LUCAS AND DEANN LUCAS,  
Debtor(s); ROBERT A. HAWKINS,  
Chapter 7 Trustee,

Respondents.

LBR 4001-1 and 9014-1(f)(1)

DATE: June 22, 2010  
TIME: 1:30 p.m.  
CTRM: 11

2500 Tulare Street,  
Fresno, CA 93721-1318

Aurora Loan Services, LLC<sup>1</sup> ("Movant"), moves this court for an order terminating the automatic stay of 11 U.S.C. § 362 as to Movant, so that Movant may commence and continue all

<sup>1</sup> This Motion for Relief from Automatic Stay shall not constitute a waiver of the within party's right to receive service pursuant to Fed. R. Civ. P. 4, made applicable to this proceeding by Fed. R. Bankr. P. 7004, notwithstanding Pite Duncan, LLP's participation in this proceeding. Moreover, the within party does not authorize Pite Duncan, LLP, either expressly or impliedly through Pite Duncan, LLP's participation in this proceeding, to act as its agent for purposes of service under Fed. R. Bankr. P. 7004

1 acts necessary to enforce its security interest in real property generally described as 9551 Sands  
2 Road, Delhi, California 95315.

3 On or about December 15, 2009, Andrew Lucas and DeAnn Lucas ("Debtors") filed a  
4 voluntary petition under Chapter 7 of the Bankruptcy Code, and Robert A. Hawkins was appointed  
5 as Chapter 7 Trustee. Debtors were discharged on March 29, 2010. As a result of said filing, certain  
6 acts and proceedings against Debtors and the bankruptcy estate are stayed as provided in 11 U.S.C.  
7 § 362.

8 Movant moves this court for relief from stay under 11 U.S.C. §§ 362(d)(1) and 362(d)(2).

9 **MEMORANDUM OF POINTS AND AUTHORITIES**

10 **I.**

11 **MOVANT IS ENTITLED TO RELIEF FROM THE**  
12 **AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(2).**

13 **NO EQUITY**

14 11 U.S.C. § 362(d)(2) provides that relief from the automatic stay shall be granted if the  
15 debtor does not have any equity in the property and the property is not necessary to the debtor's  
16 effective reorganization.

17 In In re San Clemente Estates, 5 B.R. 605 (Bankr. S.D. Cal. 1980), the court stated that:  
18 § 362(d)(2) reflects congressional intent to allow creditors to  
19 immediately proceed against the property where the debtor has no  
20 equity and it is unnecessary to the reorganization, even where the  
debtor can provide adequate protection under § 362(d)(1). (Emphasis  
added).

21 Id. at 610 (emphasis added).

22 In In re Mikole Developers, Inc., 14 B.R. 524, 525 (Bankr. E.D. Pa. 1981), the court stated  
23 that in determining whether equity exists in the property for purposes of § 362(d)(2), all  
24 encumbrances are totaled, whether or not all the lienholders have joined in the request for relief from  
25 stay. The Ninth Circuit has concurred with this view in Stewart v. Gurley, 745 F.2d 1194 (9th Cir.  
26 1984).

27 ///

28 ///

1 An appropriate cost of sale factor should also be added to determine if the debtor has any  
2 equity in the property. La Jolla Mortgage Fund v. Rancho El Cajon Associates, 18 B.R. 283, 289  
3 (Bankr. S.D. Cal. 1982).

4 On or about March 14, 2007, Debtors, for valuable consideration, made, executed and  
5 delivered to CTX Mortgage Company, LLC ("Lender") a Note in the principal sum of \$508,000.00  
6 (the "Note"). Pursuant to the Note, Debtors are obligated to make monthly principal and interest  
7 payments commencing May 1, 2007, and continuing until April 1, 2037, when all outstanding  
8 amounts are due and payable. The Note provides that, in the event of default, the holder of the Note  
9 has the option of declaring all unpaid sums immediately due and payable. A true and correct copy of  
10 the Note is attached to the concurrently served and filed Exhibits to the Declaration in Support of  
11 Motion for Relief From Automatic Stay ("Exhibits") as exhibit A and incorporated herein by  
12 reference.

13 On or about March 14, 2007, the Debtors made, executed and delivered to Lender a Deed of  
14 Trust (the "Deed of Trust") granting Lender a security interest in real property commonly described  
15 as 9551 Sands Road, Delhi, California 95315 (the "Real Property"), which is more fully described in  
16 the Deed of Trust. The Deed of Trust provides that attorneys' fees and costs incurred as a result of  
17 the Debtors' bankruptcy case may be included in the outstanding balance under the Note. The Deed  
18 of Trust was recorded on March 16, 2007, in the Official Records of Merced County, State of  
19 California. A true and correct copy of the Deed of Trust is attached to the Exhibits as exhibit B and  
20 incorporated herein by reference.

21 Subsequently, Lender's beneficial interest in the Deed of Trust was sold, assigned and  
22 transferred to Movant. A true and correct copy of the Corporation Assignment of Deed of Trust  
23 evidencing the Assignment of the Deed of Trust to Movant is attached to the Exhibits as exhibit C  
24 and incorporated herein by reference.

25 The obligation under the Note is in default as of January 1, 2009, for failure to make  
26 payments to Movant. As of April 14, 2010, the total obligation due and owing under the Note is in  
27 the approximate amount of \$559,607.52, representing the principal balance of \$508,000.00, interest  
28 in the sum of \$42,594.92, late charge in the amount of \$388.95, escrow advances in the amount of

1 \$5,257.00, and a recoverable balance in the amount of \$3,366.65. This is an approximate amount for  
2 purposes of this Motion only, and should not be relied upon as such to pay off the subject loan as  
3 interest and additional advances may come due subsequent to the filing of the Motion. An exact  
4 payoff amount can be obtained by contacting Movant's counsel. Further, Movant has incurred  
5 additional post-petition attorneys' fees and costs in bringing the instant Motion. Moreover, the total  
6 arrears under the Note are in the approximate sum of \$43,316.95, excluding the post-petition  
7 attorneys' fees and costs incurred in filing the instant Motion.

8 **II.**

9 **RELIEF FROM STAY**

10 **LACK OF EQUITY**

11 Movant is informed and believes that, based on a Broker's Price Opinion, the fair market  
12 value of the Property as of March 9, 2010 is approximately \$360,000.00. A true and correct copy of  
13 the Broker's Price Opinion is attached to the Exhibits as exhibit D and incorporated herein by  
14 reference.

15 Based on the above, Movant maintains that the equity in the Property is as follows:

Fair Market Value:	\$360,000.00
Less:	
Movant's Trust Deed	\$559,607.52
Costs of Sale (8%)	<u>\$28,800.00</u>
Equity in the Property:	\$<228,407.52>

19  
20 As a result, there is no equity in the Property for the bankruptcy estate. Moreover, since this  
21 is a Chapter 7 proceeding, there is no reorganization in prospect. As a result, Movant is entitled to  
22 relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(2).

23 **III.**

24 **MOVANT IS ENTITLED TO RELIEF FROM THE**  
**AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(1).**

25 **CAUSE - LACK OF ADEQUATE PROTECTION**

26  
27 Pursuant to the provisions of 11 U.S.C. §§ 361 and 362(d)(1), Movant is entitled to adequate  
28 protection of its interest in the Property.

1 Movant submits that adequate protection in this case requires normal and periodic cash  
2 payments, as called for by the Note, plus the repayment of any and all delinquent amounts owed to  
3 Movant, including all attorneys' fees and costs incurred in the filing of this motion.

4 Movant is informed and believes that Debtors are presently unwilling or unable to provide  
5 adequate protection to the Movant and there is no probability that adequate protection can be  
6 afforded to Movant within a reasonable time.

7 By reason of the foregoing, Movant is entitled to relief from stay under 11 U.S.C.  
8 § 362(d)(1), based upon the failure of Debtors to provide adequate protection to Movant.

9 WHEREFORE, Movant respectfully prays for an Order of this court as follows:

10 1. Terminating the automatic stay of 11 U.S.C. § 362, as it applies to the enforcement by  
11 Movant of all of its rights in the Real Property under the Note and the Deed of Trust;

12 2. That the 14-day stay described by Bankruptcy Rule 4001(a)(3) be waived;

13 3. Granting Movant leave to foreclose on the Real Property and to enforce the security  
14 interest under the Note and the Deed of Trust, including any action necessary to obtain possession of  
15 the Property;

16 4. Permitting Movant to offer and provide Debtors with information re: a potential  
17 Forbearance Agreement, Loan Modification, Refinance Agreement, or other Loan Workout/Loss  
18 Mitigation Agreement, and to enter into such agreement with Debtors;

19 5. Alternatively, in the event this court declines to grant Movant the relief requested  
20 above, Movant requests that an Order for adequate protection be issued, requiring the Debtors to  
21 reinstate and maintain in a current condition all obligations due under the Note and Deed of Trust  
22 and all other deeds of trust encumbering the Real Property, including Debtors' obligations to pay  
23 when due (a) the monthly installments of principal and interest, as required under the Note;  
24 (b) tax/insurance obligations; and (c) any sums advanced by Movant on behalf of Debtors in order to  
25 protect Movant's interest in the Real Property, including all attorneys' fees and costs incurred in the  
26 filing of this motion;

27 ///

28 ///

1           6.       That the attorneys' fees and costs incurred by Movant for filing the instant Motion be  
2 included in the outstanding balance of the Note as allowed under applicable non-bankruptcy law;  
3 and

4           7.       For such other and further relief as the court deems just and proper.

5 Dated: May 19, 2010

PITE DUNCAN, LLP

6  
7  
8                   /s/JOSEPH C. DELMOTTE (CA SBN 259460)  
9                   JOSEPH C. DELMOTTE  
10                  Attorneys for AURORA  
11                  LOAN SERVICES, LLC  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28